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NO. 85-998 (8)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

V.

RONALD DALE DUNN

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO GOVERNMENT'S SUPPLEMENT

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ATTORNEY FOR RESPONDENT

App

QUESTION PRESENTED

Where a barn is located in a clearing surrounded by woods on a 198-acre ranch circled by a perimeter fence; ranch house and buildings are located at the end of a private drive approximately one-half mile from public road; entrance to private road secured by locked chain; barn was not visible from the public road or perimeter fence; contents of barn could not be seen from air or ground unless barn approached by one penetrating encircling fence, walked under its overhang, stood next to fishnet front covering; and entry could be made only by force or hurdling wooden gates which were locked; is this intrusion by officers a violation of the rights guaranteed by the Fourth Amendment?

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OPINIONS BELOW

The opinion of the Court of Appeals on remand from this Court is reported at 755 F.2d 880. The original opinion of the Court of Appeals is reported at 674 F.2d 1093.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATEMENT OF THE CASE

After trespassing upon the ranch owned by Ronald Dale Dunn and conducting a visual and systematic search of the barns, garage, house and carport areas of the ranch, officers came to the barn where they smelled an odor which was not contraband. They tried a door to the barn and found it locked. They crossed another fence and at that point they were right underneath the

overhang of the barn where a gate led further into the barn. They tried this gate and found it locked and shut. Above this gate was a netting which hung from the ceiling to the gate. They stood right at the gate and began their search with the aid of flashlights. R-4-80.

The officers looked into the carport and then tried to enter the garage by trying the windows and the doors and everything was locked up. These trespassing officers searched only buildings on the property. R-4-83.

ARGUMENT

The government's crafty way of adding facts to its conclusory statements cannot convert the issue in this case to one meriting review.

This case was properly decided by the Court of Appeals who, following the mandate of this Court, went through studied consideration of the holding in Oliver v. United States 466 U.S. 170, re-examined the facts against the backdrop of Oliver and other decisions of the United States Supreme Court. After this time-consuming study the Court of Appeals determined that "the holding and teachings of Oliver v. United States neither direct nor require the subject barn to be outside the curtilage of the house". (App. 1 Respondent's Brief) This decision is manifestly correct.

The government does not challenge the holding of the Court of Appeals which stated Oliver does not require the barn to be outside the curtilage. The government further does not attempt to show how Oliver applies to

this case. It falls back upon the "open fields doctrine" which was defined in Oliver v. United States as follows:

> "It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. As open field need be neither "open" nor a "field" as those terms are used in common speech. For example, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment."

This definition does not include the barn searched by officers without a warrant in this case. The trails of the government's rhetoric in its attempt to seek review extend to allegations requiring prediction by law enforcement officers. This Court has addressed that issue in Johnson v. United States 333 U.S. 10, 13-14 (1947):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. * * * When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

The tireless work of the Court of Appeals in complying with the mandate of this Court has been subjected to the government's attempt to discredit these efforts. The Hutto v. Davis, 454 U. S. 370, (1982) and Florida v. Rodriguez, 469 U.S. _____, 83 L Ed.2d. 165 are not comparable. In these cases no reasons were given for the action taken by the Court on remand. In this case,

the Court of Appeals has given consideration to this Court's mandate and has given its reason for reinstating its original opinion. Thus, the government's attempts to demean the efforts of the Court of Appeals appear trite.

The government obviously is not aware that farms and ranches have fences around the house separating it from the barns to keep the farm animals out of the yard. The barn is still a vital part of the ranch or farm, and is most assuredly associated with the home and family life. The distance from the house to the barn is not a considerable distance from the house as the government would like to have one believe, but a very short distance by all other standards. Further, there is no access to the ranch by the public as the ranch buildings are one-half mile from the public road. In fact, the Court in Oliver expressly holds:

> "In this light, the rule of Hester v. United States, supra, that we re-affirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. See also Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865, 40 L Ed 2d 607, 94 S Ct 2114 (1974). This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference." (Emphasis added)

Therefore the government seeks to disregard this Court's express affirmation that curtilage is protected.

CONCLUSION

For the above reasons, Respondent respectfully requests

that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

LOUIS DUGAS, JR., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for RONALD DALE DUNN, Respondent, in the above matter; and that a true and correct copy of the above and foregoing Brief in Opposition has been mailed to the attorney for the Petitioner, the Honorable Charles Fried, Solicitor General of the United States of America, by mail, postage prepaid, on this the 22nd day of May, 1986.

LOUIS DUGAS, JR.